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In the Supreme Court of the United States.

OCTOBER TERM, 1914.

JOPLIN MERCANTILE COMPANY AND JOSEPH Filler, petitioners,
v.
THE UNITED STATES.
No. 648.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

BRIEF OF THE UNITED STATES.

STATEMENT.

This case is before the court on certiorari granted at the present term.

Petitioners were convicted under an indictment charging them with conspiracy to commit an offense against the United States—"to wit, to unlawfully, knowingly, and feloniously introduce and attempt to introduce malt, spirituous, vinous, and other intoxicating liquors into the *Indian country*, which was formerly the Indian Territory and now is included in a portion of the State of Oklahoma, *and* into the city of Tulsa, Tulsa County, Oklahoma, which was formerly within and is now a part of what is known as the Indian country, *and into other parts* and

portions *of that part of Oklahoma which lies within the Indian country.*" (R. 5.) The company was sentenced to pay a fine of one thousand dollars and the costs of the prosecution. Filler was sentenced to imprisonment for one year and a day. (R. 17 and 18.) The Circuit Court of Appeals for the Eighth Circuit, upon writ of error prosecuted by petitioners, affirmed the judgment of conviction (213 Fed. 926; R. 33 *et seq.*), holding, in substance, that the indictment was valid under the act of March 1, 1895, 28 Stat. 693, 697, as well as under section 2139 R. S., as amended July 23, 1892, 27 Stat. 260, and January 30, 1897, 29 Stat. 506; also that a corporation could be indicted for conspiracy to commit a felony.

Concretely stated petitioners contend (1) that the indictment can not be construed as charging a conspiracy to violate the act of 1895, because the language employed by the pleader is that contained in the act of 1892 and 1897, and further that it is not charged that the introduction of liquor was to be from without the State, the contention in this respect being that the act of 1895 is no longer applicable to intrastate shipments of liquor into old Indian Territory; (2) that the indictment can not be construed as charging a conspiracy to violate the acts of 1892 and 1897, because the court should have taken judicial notice of the fact that Tulsa, one of the places to which petitioners conspired to ship liquor, was not "Indian country"; that had such judicial notice been taken, the remainder of the

indictment would have been bad for uncertainty; (3) that the indictment is bad for duplicity, if, as held by the Circuit Court of Appeals, it charges a conspiracy to violate more than one act; and (4) that a corporation can not be lawfully indicted for conspiracy to commit a felony.

ARGUMENT.

I.

The indictment fairly construed must, at this stage, there being a judgment of conviction, be held to properly charge a conspiracy to violate the act of 1895.

The contention that the indictment cannot be construed as charging a conspiracy to violate the act of 1895 rests mainly upon the assertion that there is no specific allegation, aside from the overt acts, that the liquor was to be introduced from *without* the State. The Circuit Court of Appeals dealt with the indictment upon the assumption that it did not contain the specified allegation, and held that the act of 1895 prohibited intra as well as inter state shipments of liquor into old Indian Territory.

While recognizing that its conclusion seemed to be somewhat variant from that announced in *Ex parte Webb*, 225 U. S. 663, and *United States* v. *Bob Wright*, 229 U. S. 226, the Circuit Court of Appeals nevertheless believed itself justified in entering upon an independent examination of the question because, in its judgment, the statements of this court in those cases as to the effect of the enabling act upon the act of 1895 were made upon the concession of the Govern-

ment that the latter act was no longer operative in Oklahoma so far as purely intrastate shipments of liquor were concerned.

The Government does not deem it necessary to argue the question in this case, because it seems clear that the judgment of conviction below can be supported upon the ground, among others, that the indictment, properly construed, actually charges a conspiracy to bring about an introduction of liquor from *without* the State. The attention of this court, however, is invited to the reasoning of the Circuit Court of Appeals upon the point. The question is not free from difficulty, and the Government reserves the right to further argue it in any future cases brought to this court which seem to directly involve the point.

Petitioners' insistence that the overt acts cannot be looked to as a part of the description of the offense, apparently disregards the fact that under section 37 of the Criminal Code of the United States the offense there defined is not merely the unlawful agreement, but such agreement plus an overt act. This is definitely settled in *Hyde* v. *United States*, 225 U. S. 347, 359, wherein it was said:

> Indeed it must be said that the cases abound with statements that the conspiracy is the "gist" of the offense, or the "gravamen" of it, and we realize the strength of the argument based upon them. But we think the argument insists too exactly on the ancient law of conspiracy, and does not give effect to the change made in it by Sec. 5440, *supra*.

It is true that the conspiracy, the unlawful combination, has been said to be the crime, and that at common law it was not necessary to aver or prove an overt act; but Sec. 5440 has gone beyond such rigid abstraction and prescribes, as necessary to the offense, not only the unlawful conspiracy, but that one or more of the parties must do an "act to effect" its object, and provides that when such act is done "all the parties to such conspiracy" become liable. Interpreting the provision, it was decided in *Hyde* v. *Shine*, 199 U. S. 62, 76, that an overt act is necessary to complete the offense. And so it was said in *United States* v. *Hirsch*, 100 U. S. 33, recognizing that while the combination of minds in an unlawful purpose was the foundation of the offense, an overt act was necessary to complete it. *It seems like a contradiction to say that a thing is necessary to complete another thing and yet that other thing is complete without it.* It seems like a paradox to say that anything, to quote the Solicitor General, "can be a crime of which no court can take cognizance." *The conspiracy, therefore, cannot alone constitute the offense. It needs the addition of the overt act. Such act is something more, therefore, than evidence of a conspiracy.* It constitutes the execution or part execution of the conspiracy and all incur guilt by it, or rather complete their guilt by it, consummating a crime by it cognizable then by the judicial tribunals, such tribunals only then acquiring jurisdiction.

It conclusively follows from this ruling that an indictment under section 37 of the Criminal Code is to be examined by its four corners, and that it will be free from successful attack if all the elements of the offense are found in the description of the unlawful agreement and overt acts considered together. Nothing but the application of some highly technical rule, having no rightful place in modern criminal pleading, would permit resort to the description of the overt acts for the purpose of showing the venue, and an offense within the period of limitations (*Hyde* v. *United States*, 225 U. S. 347, 356, 367; and *Brown* v. *Elliott*, *idem* 392, 400, 401), but would deny all reference to such acts for the purpose of showing some other necessary averment.

Applying, therefore, to the indictment in the case at bar the true rule declared by this court, it is found that the overt acts aver shipments of liquors from *without* the State of Oklahoma, which would bring the case within that portion of the act of 1895 surviving under the rule of the Wright case, *supra*.

For convenience we attach as Appendix A hereto, the provisions of the several acts of 1892, 1895, 1897, and 1906, in parallel, as respects the *person*, *place*, *liquors*, and *acts* reached by the respective prohibitions of each.

But even conceding that the indictment does not aver that the liquor was to be shipped from without the State, the record, while not containing any of the evidence taken at the time, justifies the inference that the case was prosecuted and defended upon the

theory that interstate shipments of liquor were involved, for petitioners moved for a new trial upon the ground of newly discovered evidence relating to such interstate shipments (R. 13). In this situation petitioners are now estopped from urging the objection. *Grant Brothers Construction Company* v. *United States*, 232 U. S. 647, 661. In that case the court deemed the omitted averment essential, but said:

> The defendant was in no wise prejudiced by the defect, and to make it a ground for reversing the judgment, notwithstanding the theory upon which the trial proceeded, would be most unreasonable. *San Juan Light Co.* v. *Requena*, 224 U. S. 89, 96; *Campbell* v. *United States*, *Id.* 99, 106.

The omission, if any, did not prejudice petitioners, and should now be treated as a defect in matter of form only, and therefore covered by section 1025 R. S. *New York Central R. R.* v. *United States*, 212 U. S. 481, 497; *Garland* v. *Washington*, 232 U. S. 642, 646, furnishes additional illustration of the manner in which this court is rejecting old rules which permitted objections on a parity with the one here raised, to constitute reversible error.

Petitioner further urges that the indictment is not good under the act of 1895 because its language seems to be that of the act of 1897. They do not contend that all the elements, save that relating to introduction from without the State, treated above, are not set forth, but seem to rely upon the fact that the language employed is not technically that in which

the act of 1895 is framed. This court will not reverse upon that ground. The indictment is one for conspiracy, and as said by this court in *Williamson* v. *United States*, 207 U. S. 425, 447, "certainty, to a common intent, sufficient to identify the offense which the defendant conspired to commit, is all that is requisite in stating the object of the conspiracy." The indictment in the case at bar certainly meets this test.

In the *Pronovost* case, 232 U. S., 487–8–9, the indictment charged introduction of liquor into "the Flathead Indian Reservation, * * * then and there being an Indian country." On the trial defendant "admitted the introduction as charged in the indictment." The court said:

> * * * So far as appears, the offense charged in the indictment, and shown at the trial, was manifestly cognizable in the District Court.

If an indictment charging the *whole* of the reservation, or the *whole* of the Indian Territory, to be "Indian country" is good, an indictment charging *parts* of either, or of Oklahoma, to be "Indian country" should be equally good.

See also *Hall* v. *United States*, 168 U. S. 632, 639; *Bartell* v. *United States*, 227 U. S. 427, 433; *Hendricks* v. *United States*, 223 U. S. 178, 184; *Dunbar* v. *United States*, 156 U. S. 185, 192; and *Schaap* v. *United States*, 210 Fed. 853, 856.

II.

The indictment legally states a conspiracy to violate section 2139 R. S., as amended by the acts of 1892 and 1897.

Petitioners also insist that the indictment does not charge a conspiracy to violate section 2139, R. S., as amended, because Tulsa, one of the places to which they are charged with conspiring to transport liquors, is not, it is contended, within the Indian country; that the trial court should have taken judicial notice of that fact, and this would have rendered the description in the indictment of the other places in the Indian country bad for uncertainty. In addition to this it is claimed that if the indictment is to be construed as charging a conspiracy to violate both the act of 1895 and section 2139, R. S., as amended, pursuant to the ruling of the Circuit Court of Appeals, then it is open to the objection of duplicity.

Taking petitioners at their word, they are estopped to now contend that the indictment does not properly charge a conspiracy to violate section 2139, R. S., as amended, for at page 28 of their petition to this court for a writ of certiorari in this case they said:

> The framer of the indictment drew the conspiracy section in the exact language of the statute, to-wit, Act of January 30, 1897, not the Act of 1895, which makes it an offense for any person to "*introduce or attempt to introduce* * * * intoxicating liquor of any kind whatsoever into the Indian country."

> In order to set apart the Indian country into which it was conspired to introduce the intoxicating liquors so as to set it apart from the vast expense of territory west of the Mississippi River made Indian country by the Act of June 30, 1834, the words "Indian country" in the indictment were limited and qualified and explained by adding the words, and setting them off by commas (,), "which was formerly Indian Territory and is now included in a portion of the State of Oklahoma." That was the general charge made in the indictment as to what was intended by the words "Indian country."
>
> * * * * *
>
> If the English language means anything at all, as counsel interprets it, this indictment charges nothing but a conspiracy to introduce liquor into the Indian Territory in violation of the Act of 1897.

And again at page 4 of their petition it is stated:

> Thereafter a trial in due form was had for violation of Section 37 of the Penal Code *as endorsed on the indictment*, the jury finding the defendants, Joplin Mercantile Company and Joseph Filler, guilty, and * * * Martin F. Witte, not guilty.

The record shows that the indictment was indorsed: "Indictment for violation of section 37, Penal Code, conspiracy to violate section 2139 R. S."

Reversal can not now be supported by a showing that the description of the *places* in the Indian country should have been set forth in the indict-

ment in greater detail. Petitioners should have moved for a bill of particulars if they "desired further specification and identification," but this they did not do, so far as the record shows. Here again the defect, if any, resolves itself into one of form, and for that reason would preclude a reversal. *Rosen* v. *United States*, 161 U. S. 29, 32, 34, and *Hendricks* v. *United States*, 223 U. S. 178, 184.

Furthermore, the contention of petitioners is opposed to the ruling of this court in *Williamson* v. *United States*, 207 U. S. 425, 449, to the effect that an indictment charging a conspiracy to commit an offense need not state all the elements of such offense "with technical precision." That case is closely analogous to the one at bar, in that it charged a conspiracy to suborn a large number of persons, not identified. This court held the averment sufficient, saying:

> * * * It was not essential to the commission of the crime that in the minds of the conspirators the precise persons to be suborned, or the time and place of such suborning, should have been agreed upon, and as the criminality of the conspiracy charged consisted in the unlawful agreement to compass a criminal purpose, the indictment, we think, sufficiently set forth such purpose. The assignments of error which assailed the sufficiency of the indictment are, therefore, without merit.

See also *Thomas* v. *United States*, 156 Fed. 897, 906, and *Ching* v. *United States*, 118 Fed. 538, 540.

So in the case at bar it was not essential to the commission of the crime that petitioners should have agreed upon the precise points in the Indian country to which they would transport the liquors.

This view renders it unnecessary to determine whether Tulsa, one of the terminal points of shipment, is within or without the Indian country, although, as pointed out by the Circuit Court of Appeals, it would seem that such question is one for proof, not judicial notice. *Dick* v. *United States*, 208 U. S. 340, 351; *Schaap* v. *United States*, 210 Fed. 853, 855, 857; *Evans* v. *Victor*, 204 Fed. 361, 365.

III.

Alleged duplicity.

Petitioners also assert that the action of the Circuit Court of Appeals in construing the indictment as charging a conspiracy to violate the act of 1895 and section 2139, R. S., as amended, renders the indictment bad for duplicity. This contention is devoid of merit. The offense is the conspiracy, and the conspiracy would be single, no matter how many repeated violations of law may have been the object thereof. In the Williamson case hereinbefore cited, 207 U. S. 425, the defendants were charged with conspiring to suborn a large number of persons. Each person suborned would have constituted a distinct violation of law, yet this court held the indictment sufficient. In *Heike* v. *United States*, 227 U. S. 131, 139, an examination of the record shows that the indictment

charged a conspiracy "to commit *offenses* against the United States," etc. In that case the point now raised by petitioners was apparently not deemed worthy of notice either by counsel or this court. In *John Gund Brewing Company* v. *United States*, 206 Fed. 386, the question was squarely raised, and decided upon authority by the Circuit Court of Appeals for the Eighth Circuit favorably to the United States.

To the same effect are *State* v. *Sterling*, 34 Ia. 443, 444; *State* v. *Wilson*, 121 N. C. 650, 655; and Bishop's New Criminal Procedure (2d ed.) sec. 226, p. 1369.

IV.

A corporation can be indicted for conspiracy.

It is urged that the corporation, one of the petitioners, could not legally be indicted for conspiracy, and reliance is had solely upon *State* v. *Delmar Jockey Club*, 200 Mo. 34, 48. The doctrine announced in that case was rejected by this court in *New York Central R. R. Co.* v. *United States*, 212 U. S. 481, 493, in which a conviction of the railroad corporation for unlawfully giving rebates was upheld. This court said that "there is no more difficulty in imputing to a corporation a specific intent in criminal proceedings than in civil." To the same effect are *United States* v. *Union Supply Co.*, 215 U. S. 50; *Cohen* v. *United States*, 157 Fed. 651; *United States* v. *MacAndrews and Forbes Co.*, 149 Fed. 823, 835; and *Roukous* v. *United States*, 195 Fed. 353, 355 (certiorari denied by this court, 225 U. S. 710).

V.

CONCLUSION.

It is not the grounds upon which the Circuit Court of Appeals bedded its judgment that can be made the basis of reversal in this court, but only error in the judgment itself. *McClung* v. *Silliman*, 6 Wheat. 598; *Ex parte Crane*, 5 Pet. 190, 204.

It is plain that no substantial rights of petitioners have been prejudiced, and as the indictment states an offense under section 37 of the Criminal Code, the judgment of conviction should be affirmed. *Connors* v. *United States*, 158 U. S. 408, 411; *Williams* v. *United States*, 168 U. S. 382, 389.

WILLIAM WALLACE, JR.,
Assistant Attorney General.

DECEMBER, 1914.

APPENDIX A.

	Act of 1892.	Act of 1895.	Act of 1897.	Act of 1906 (the enabling act).
Person.....	*Every* person.....	Any person.....	Any person.....	Any person.
Place.....	Indian *country*.....	Indian *Territory*.....	Indian *country* (including allotments while title held in trust).	Indian *Territory*, *Osage Reservation*, and *other parts* of *State* which were Indian reservations on January 1, 1906.
Liquors....	Spirits, ale, beer, wine, or intoxicating liquor.	Vinous, malt, or fermented liquor; or any other intoxicating drink, fermented or not.	Malt, spirituous, or vinous liquor, incluidng beer, ale, wine, ardent or intoxicating liquor or essence or extract producing intoxication.	Any intoxicating liquor of any kind, including beer, ale, and wine.
Act.....	Sell, exchange, give, barter to Indians under charge of an agent.	Manufacture, sell, give away, or in any manner or by any means furnish to anyone.	Sell, exchange, give, barter to Indian allottees (while title held in trust) or to Indian wards of Government under charge of agent, etc.	Manufacture, sell, barter, give away, or otherwise furnish.
	Introduce or attempt to introduce into the Indian country.	*Carry*, or have *carried into* Indian Territory.	Introduce, or attempt to introduce into Indian country, including allottees, as above.	*Ship in*, or *convey*, from *other parts* of State.
				Advertise for sale, or solicit the purchase of.

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In the Supreme Court of the United States.

OCTOBER TERM, 1914.

JOPLIN MERCANTILE COMPANY AND JOSEPH FULLER, petitioners, v. THE UNITED STATES. No. 648.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

MOTION BY THE UNITED STATES TO ADVANCE.

Comes now the Solicitor General and moves the court to advance this cause for hearing on a day convenient to the court during the present term.

Petitioners were convicted in the District Court for the Eastern District of Oklahoma under an indictment charging them and others with conspiracy to commit an offense against the United States, to wit, introducing and attempting to introduce intoxicating liquors into the Indian country.

The indictment, after charging the conspiracy, sets forth the various acts committed by the petitioners in pursuance of such conspiracy, which acts

comprised the delivery on different dates to the American Express Company at Joplin, Missouri, of several shipments of intoxicating liquors consigned to various consignees in Tulsa, Oklahoma, within the Indian country.

The company was sentenced to pay a fine of one thousand dollars and the costs of the prosecution, and Fuller was sentenced to imprisonment for one year and a day.

Upon writ of error the Circuit Court of Appeals affirmed the judgment of conviction (213 Fed. 926), holding, in substance, that the indictment was good as charging a conspiracy to introduce intoxicating liquors into the Indian country in violation of both the act of March 1, 1895, which prohibits the introduction of intoxicating liquors into the Indian Territory (now a part of the State of Oklahoma), and section 2139, R. S., as amended July 23, 1892; and January 30, 1897, which prohibits the introduction of intoxicating liquors into the Indian country.

Application for certiorari was made to this court and the writ granted.

The questions involved are of vital importance in future prosecutions for the shipment of intoxicating liquors into the Indian country and for this reason an early review by this court is desirable.

Opposing counsel concur in this motion.

JOHN W. DAVIS,
Solicitor General.

NOVEMBER, 1914.

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